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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 805.

ARTHUR LEE RANEY, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTIONS PRESENTED.

Petitioners set out the first Question Presented as follows (Pet. 2):

> 1. Whether—13 years after **Brown v. Board of Education**,—a "freedom of choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other would immediately desegregate the system.

This question seeks to have the Court review an issue that was not tried in the district court. The issue tried in that court was whether it could and should require a proposed school building to be built on a particular site because of the effect of such construction on the desegregation of the school district (Pet 10a). It decided it could do so, but that the evidence did not warrant such action in this instance (Pet. 14a).

The court of appeals rejected the argument of these petitioners that it should order a redistribution of students within the school system, specifying what grades should be taught at each school, because that question (like the one petitioners seek to present here) was raised for the first time on appeal (Pet. 17a). The only question on this phase of the case presented by the Record and the decisions of the courts below is:

> "1. Whether this Court should consider the constitutional adequacy of 'freedom-of-choice' plans on the Record in this case which contains no evidence showing the operation of respondents' plan subsequent to its adoption in 1965, and in which the question was not presented to, nor passed upon by, the district court?"

The second Question Presented as stated by petitioners is (Pet. 2):

> 2. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the Department of Health, Education and Welfare had initially approved the Board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

This question does not fairly characterize the decision of the court of appeals. That court held that the plead-

ings did not attack the respondents' desegregation plan (Pet. 24a), that no issue as to the adequacy of the plan or its implementation was raised in the district court (Pet. 25a), and there being no evidence that respondents were not proceeding to carry out the plan in good faith there was no basis for the district court to assume the detailed supervision of desegregation of this school system. That court agreed with the district court's observation (Pet. 14a):

> "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *."

An accurate statement of the question presented by this phase of the decision of the court below is:

> "Whether it was error for the court of appeals to affirm dismissal of the complaint by the district court where both courts found that plaintiffs had utterly failed to sustain the burden of proof on the issues joined in, and tried by, the district court, and both courts found (on substantial evidence) that respondents were proceeding in good faith to desegregate the district?"

STATEMENT.

It would unduly lengthen this brief to reply in detail to petitioners' efforts to picture respondents as hostile to Negroes seeking to exercise their constitutional rights and as being guilty of bad faith in the operation of the school system and its desegregation plan. It is sufficient answer to note that both of the courts below heard such charges and found them so lacking in factual support that the action was dismissed.

The facts in the Record are such that the court of appeals concluded:

> "The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school" (Pet. 23a).
>
> • • • • • • •
>
> "Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith" (Pet. 24a).

The distorted picture drawn by petitioners of the conduct of desegregation in this school district is obviously designed to draw attention away from the issues actually litigated in the courts below and to suggest issues, not tried below, that are within the ambit of this Court's sensitivity to protection of minority group constitutional rights. However, the Record does not reflect hostility by respondents to the exercise of such rights by those represented by petitioners. This school district moved promptly to comply with the Civil Rights Act of 1964, and in a display of utmost good faith submitted a desegregation plan to the Department of H. E. W. providing for a much more rapid rate of desegregation than was required by the Regulations of that Department. Unlike most school

districts of the South, the majority of which chose to desegregate over a period of three years as permitted by those Regulations, this district elected to fully desegregate all twelve grades the first year.

The assignments resulting from the exercise of the freedom of choice right placed seventy-one Negro students with 299 white students at the previously white school (R. 79-80). The Record reflects the success of the respondents' plan of desegregation. The Negro students were accepted as members of the Gould school's athletic teams (R. 99-100), and several in each class earned enrollment on the honor roll (R. 100).

It is equally important to note what the Record does not reflect. It does not reflect any fact concerning the operation of the desegregation plan subsequent to the trial on November 24, 1965. It does not reflect the progress of desegregation pursuant the plan in the 1966-67 school year and it does not reflect such progress during the current school year. Neither does it reflect the status of faculty desegregation for those years subsequent to the trial.

The Record here simply does not afford a basis for review of the questions propounded by petitioners.

ARGUMENT.

Petitioners' Question No. 1 seeks to test the constitutional validity of "freedom of choice" plans generally. The assertion is that if the school assignments chosen pursuant to such a plan include a sufficient number of Negroes electing to attend a particular school that the result is an all-Negro student body, then this Court should hold that the plan is inadequate to satisfy the mandate of **Brown v. Board of Education.** The argument ignores this Court's recognition of the constitutional adequacy of freedom of choice assignment procedures that was implicit in **Goss v. Board of Education,** 373 U. S. 683, where it is said at page 689:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein."

However, aside from the merits of the question, this Record affords no basis for its presentation. The only question litigated in the district court, and the only question decided by that court, was whether it should order the school authorities to build a proposed school building at a particular site (Pet. 10a, 13a). When the petitioners urged the court of appeals to pass on a question somewhat akin to that they now seek to present here, that court said (Pet. 17a):

> "Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the build-

ing be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered on appeal."

Moreover, as already noted, there is no factual basis upon which to measure the adequacy of respondents' desegregation plan in its practical operation. There is nothing in this Record to show how the plan has operated, and what has been its results, since the trial in November, 1965. If in fact the plan has not been operated fairly, or in its operation has failed to meet constitutional standards, then the doors of the district court are always open for any aggrieved party to plead and prove such circumstances in a proper proceeding. Some of the same attorneys who represent petitioners here did file another suit against this school district on June 8, 1967, in the United States District Court for the Eastern District of Arkansas (Civil Action No. PB 67 C-39), raising issues pertaining to desegregation but not those they seek to raise here. That suit was heard by a different district judge from the one who tried the case at bar, the complaint was dismissed, and an appeal now pends in the court of appeals (**Freeman v. The Gould Special School District of Lincoln County, Arkansas**, No. 19016).

Petitioners suggest that there is a relationship between this case and **Green v. County School Board**, No. 695, October Term, 1967, and **Monroe v. Board of Commissioners**, No. 740, October Term, 1967, each now pending on a petition for writ of certiorari. While the questions presented in those cases, as framed by petitioners, may

be somewhat similar to those they present here, the significant consideration is that the Record here does not afford a basis upon which the questions so presented could be decided. It is respectfully submitted that the petition was filed in this case for the sole purpose of permitting reference to the other two pending petitions, advancing further arguments on the questions therein presented, and thereby exaggerate the importance of those questions.

Petitioners' Question No. 2 is grounded upon the assertion that the court of appeals misconceived the obligation of the lower federal courts created by the **Brown** decisions to retain school desegregation cases on their dockets. Indeed this Court did say in **Brown v. Board of Education,** 349 U. S. 294, 301:

> "During this period of transition, the courts will retain jurisdiction of these cases."

The court obviously had reference to the five consolidated cases then before it, but the lower federal courts have taken this language to require that other school desegregation cases be retained on the district court docket where injunctive relief has been granted to insure that the terms of the injunction are carried out. As a result there are several hundred such cases now pending in the district courts, and many have been on those dockets for several years.

On the other hand, the **Brown** decisions cannot fairly be read to support the assertion that in any case having any relationship to school desegregation, however remote, the district is obligated to retain the suit on its docket *ad infinitum.* If this substantial class of cases were exempt from dismissal, when dismissal is the adjudication dictated by traditional legal and equitable rules, the obvious result would be an intolerable financial burden

on the litigants of being in court forever and a significant reduction in the authority of the district courts to effectuate an orderly management of their dockets.

Of course, the quoted language in **Brown** was not intended to have a reach so great as to produce such absurd results. It implied no more than that these cases would be retained on the district court dockets for so long as the circumstances in each case indicated a need for judicial supervision of the desegregation process. In cases such as the one at bar where the circumstances make appropriate a final judgment then the **Brown** language does not inhibit such disposition. It must be remembered that in this case the lower courts expressly found that respondents were proceeding in good faith to administer a desegregation plan that met constitutional standards and which was voluntarily adopted before the filing of the suit. The proof showed that they were already voluntarily discharging their constitutional obligations and manifesting the intention to continue to do so. In view of this the district court concluded: "It is obviously not the purpose of an injunction to order someone to do something he is already doing * * *." This is so well supported by both logic and precedent that it is not fairly debatable.

The court of appeals that heard this case suffers from no misconception about the obligation of the district courts to retain jurisdiction in these cases when such a course would serve the interests of justice under the circumstances. It has frequently reversed district court decisions dismissing these cases and directed that the cases be restored to the district court dockets, the most recent such decision being **Yarbrough v. Hulbert-West Memphis School District**, 380 F. 2d 962 (8 Cir., 1967).

However, where the parties have joined issue by their pleadings and their proof, and where after a full trial the district court has decided that the evidence does not

entitle plaintiffs to any judicial relief on those issues, it would be absurd to require that the case be retained on the docket simply because it had something to do with school desegregation and there was the speculative possibility that some different issue might arise between the parties in the future. The doors of the district courts remain open to adjudicate such future controversies, if and when they arise, in fresh litigation.

CONCLUSION.

The decision of the court of appeals is correct: it is in accord with the applicable decisions of this Court; and the questions petitioners seek to present here are unsupported by the Record. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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